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IN THE
Supreme Court of the United States
October Term, 1975

No. 75-1782

AFW FABRIC CORP., *et al.*,

Petitioners,

v.

ARNOLD MARSHEL,

Respondent.

**REPLY BRIEF IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

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This brief is submitted by petitioners in reply to respondent Arnold Marshel's brief in opposition to the petition for certiorari filed in this Court on June 8, 1976.

In his brief, respondent does not dispute the Second Circuit's conclusion, in its opinion denying rehearing en banc, that this and a companion case¹ are "of such extraor-

1. Green v. Santa Fe Industries, Inc., — F.2d —, CCH Fed. Sec. L. Rep. ¶95,447 (Feb. 18, 1976).

dinary importance that we are confident the Supreme Court will accept these matters under its certiorari jurisdiction * * *." (28a).² Nor does respondent deny that important questions concerning the balancing of the federal and state regulation of corporate activities arise from the Second Circuit's expansive interpretation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.³

The sole basis on which respondent opposes the petition is that the proposed merger between Concord Fabrics Inc. and AFW Fabric Corp. has been terminated, thus mooting the injunction claim. The issues raised by this petition are not moot, however, because respondent's claim for damages pursuant to Section 10(b) and Rule 10b-5 remains live, and this Court's decision on those issues can have a substantial bearing upon the outcome of the litigation.

In its decision denying rehearing en banc, the Court of Appeals for the Second Circuit necessarily concluded that the issues raised by this petition are not moot. Although it had been advised at the time of its decision that the

2. Parenthetical numerical references followed by the letter "a" are to pages of the appendices in the petition filed on June 8, 1976.

3. This Court's intense interest in balancing federal-state relations in the regulation of business was recently stated as follows by Justice Blackmun in a concurring opinion:

We should not shrink in our general approach, however, from what seems to me our constitutionally mandated task, one often set for us by conflicting federal and state laws, and that is the balancing of implicated [*sic*] federal and state interests with a view to assuring that when these are truly in conflict, the former prevail. *Cantor v. Detroit Edison Co.*, — U.S. —, —, 44 U.S.L.W. 5357, 5367 (July 6, 1976).

merger had been terminated,⁴ the Court of Appeals nevertheless concluded that the issues raised by its decision were of "extraordinary importance" and, accordingly, denied rehearing in order to "speed these cases on their way to the Supreme Court." (28-29a).

Respondent's claim for damages remains viable and constitutes a sufficient basis upon which to reject his suggestion of mootness. As stated by this Court, "[w]here several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests." *Powell v. McCormack*, 395 U.S. 486, 496 n.8 (1969). Accord, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459 (1957); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 353 (1922). In each of the foregoing cases, this Court refused to dismiss for mootness where the claim for injunctive relief was no longer at issue because of a termination of the transaction involved or similar circumstances, but a claim for monetary relief remained. Thus, for example, in *Powell v. McCormack*, *supra*, where Congressman Powell's claim for a mandatory injunction to be seated in the 90th Congress was mooted by the end of the session, this Court nevertheless rejected the respondents' mootness argument in view of the remaining claim for withheld salary, holding that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." 395 U.S. at 497. Here, as in *Powell*, respondent's claim for damages constitutes a live issue which precludes dismissal of this petition as moot.

4. The merger between Concord and AFW was terminated on February 10, 1976, and the Second Circuit was apprised of the termination on February 13, 1976. The Court of Appeals denied rehearing on March 10, 1976.

This Court's determination of the issues raised by the petition can have a direct and significant bearing upon the outcome of this litigation. The Second Circuit's decision, on which certiorari is sought, contains wide-ranging and significant views on "federal securities law * * * jurisdiction" (10a) and whether "a cause of action is stated under §10(b) and Rule 10b-5" (11a). The opinion also provides a pervasive interpretation of "the statutory language" and "remedial purposes of the Act" (11a). If the Second Circuit's decision is allowed to stand, respondent no doubt will contend that the decision is determinative as to the liability of the individual petitioners for damages under Section 10(b) and Rule 10b-5.⁵ If, on the other hand, this Court reverses and rejects the Second Circuit's expansive construction of Section 10(b) and Rule 10b-5, this will vitally affect petitioners' claim that they did not violate those provisions and hence are not liable for the damages which respondent now seeks.⁶ Since the standards for recovering damages under Section 10(b) and Rule 10b-5 are at least as high as the standards for obtaining an injunction, see *Ernst & Ernst v. Hochfelder*, — U.S. —, —, 44 U.S.L.W. 4451, 4454 n.12 (March 30, 1976), reversal of the Court of Appeals' finding of violation, which served as a predicate for its order to enter an injunction, will almost certainly preclude the existing damage claims.

5. Significantly, at no point in his brief in opposition has respondent denied that he will rely on the Second Circuit's decision in support of his claim for damages under Section 10(b) and Rule 10b-5.

6. Indeed, on review of a preliminary injunction, this Court has the power to examine the merits on the basis of the record before it, and to dismiss the complaint if satisfied that it does not state a claim for relief. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940); *Denver v. New York Trust Co.*, 229 U.S. 123, 136 (1913).

Thus, "[t]his is not a case where this Court's decision on the merits * * * 'cannot affect the rights of the litigants in the case before it.' " *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964), quoting *St. Pierre v. United States*, 319 U.S. 41, 42 (1943).

Furthermore, in cases involving sensitive issues of federal-state relations, this Court has carefully scrutinized contentions of mootness that would preclude it from adjudicating the merits. Thus, in rejecting a claim of mootness in *Liner v. Jafco, Inc.*, *supra*, this Court emphasized that because of the impact of the questions raised on federal-state relations, "[it] should be astute to avoid hindrances in the way of taking' up" the questions. *Id.* at 306. Here, the Court of Appeals' drastic expansion of the scope of Section 10(b) and Rule 10b-5 will result in an intrusion by the federal courts into an area of corporate regulation traditionally governed by state law. Accordingly, this Court should be equally reluctant to sustain respondent's contention that the issues raised by the petition are moot.

Finally, if this Court accepts respondent's contention that the issues raised by the petition are moot, and its damage claims are "speculative" (Respondent's Brief, p. 5), then it should vacate the judgment of the Court of Appeals. As stated by the Court in the leading case of *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950):

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

If the judgment is permitted to stand, respondent would be in a position to rely on it in support of his claim for damages although petitioners had been denied review by this Court based on respondent's allegation of mootness.

Conclusion

For all of the foregoing reasons, the writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. If, however, this Court determines that the issues raised by the petition are moot, the judgment and opinion of the Court of Appeals should be vacated.

Respectfully submitted,

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